127-58

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1088.

SARAH C. RoBARDS, PLAINTIFF IN ERROR,

vs.

ALFRED W. LAMB.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 3, 1887.

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1 The United States of America to Alfred W. Lamb, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein Sarah C. RoBards, appellant, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elijah H. Norton, chief justice of the supreme court of the State of Missouri, this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

ELIJAH H. NORTON,
Chief Justice.

1*a* [Endorsed:] Supreme court of Missouri. Sarah C. RoBards, pl'ff in error, *vs.* Alfred W. Lamb, def't in error. Citation. Filed September 13th, 1887. Henry W. Ewing, clerk, by Rowan Ray, D. C.

UNITED STATES OF AMERICA,
Northern Division of the Eastern Judicial District of Missouri:

I hereby certify that I have executed this writ by delivering a true copy of the same to the within-named Alfred W. Lamb; also by reading the same to the above-named A. W. Lamb. All done in the above dist. this 9th day of Sept., 1887.

J. E. COUZINS,
U. S. Marshal, East. Dist. Mo.,
By W. R. KELLY, *Dep'y.*

Fee, $2.00, p'd by appellant in error.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, at the April term, 1886, thereof, between Sarah C. RoBards, appellant, and Alfred W. Lamb, respondent, a manifest error hath happened, to the great damage of the said appellant, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second

Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

{Seal of the United States Circuit Court for the Western District of Missouri, Central Division.}

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—
E. H. NORTON, *Chief Justice.*

2*a* [Endorsed:] No. —. United States circuit court, western district of Missouri, central division. Sarah C. RoBards, appellant, *vs.* Alfred W. Lamb, respondent. Writ of error to the supreme court of the State of Missouri. Returned and filed 13th day of September, 1887. Henry W. Ewing, clerk, by Rowan Ray, D. C.

Return to Writ.

UNITED STATES OF AMERICA, *State of Missouri,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 15th day of September, A. D. 187–.

[Seal of the Supreme Court of Missouri.]

HENRY W. EWING, *Clerk,*
By ROWAN RAY, *D. C.*

3 STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the 5th day of March, A. D. 1884, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript, which is in the words and figures following, to wit:

4 *Venue.*

STATE OF MISSOURI, } ss:
County of Marion, }

OFFICE OF CLERK OF HANNIBAL COURT OF COMMON PLEAS, CITY OF HANNIBAL, MISSOURI.

I, John H. Franklin, clerk of the Hannibal court of common pleas within and for the townships of Mason and Miller, county and State aforesaid, do hereby certify that the annexed pages contain a full, true, and complete transcript of all the record and proceedings had in this court (as fully as the rules of the supreme court will allow) in the cause therein named as fully as the same remains of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office, in the city of Hannibal, this 9th day of February, 1884.

[SEAL.] JOHN H. FRANKLIN, *Clerk.*

STATE OF MISSOURI, } ss:
County of Marion, }

Be it remembered that on the 27th day of December, A. D. 1883, and in vacation, before the regular January term, 1884, of the Hannibal court of common pleas within and for the townships of Mason and Miller, in the county of Marion and State of Missouri, a certain petition was filed in the office of the clerk of said court in words and figures following, to wit:

Petition.

STATE OF MISSOURI, *County of Marion:*

Hannibal Court of Common Pleas.

SARAH C. ROBARDS, Plaintiff,

against

ALFRED W. LAMB, Defendant.

Plaintiff, for her cause of action herein, makes the following averments:

1st. That on June 1st, 1872, John B. Helm, of the city of Hannibal, Mason township, county of Marion, and State of Missouri, died at said city, leaving as his sole issue the following-named persons, to wit:

First. The children of Cyrus T. Helm, deceased, husband of Kate P. Helm and son of said John B. Helm, deceased, to wit, John C. Helm, May Helm, Jennie B. Helm, Alice P. Helm, and Henry B. Helm, all minors and all being the children of Kate P. Helm, widow of said Cyrus T. Helm, deceased.

Second. Maria L. Clayton, then and until her death wife of Henry H. Clayton and daughter of said John B. Helm, deceased, and her children, to wit, Henry H. Clayton, John B. Clayton, Jennie Clayton, Mary Clayton, and William L. Clayton.

Third. Matilda Johnson, then and ever since wife of Joseph J. Johnson and daughter of said John B. Helm, deceased.

Fourth. Sarah C. RoBards, then and ever since wife of John L. RoBards and daughter of said John B. Helm, deceased, and her children.

Fifth. Eliza B. Helm, unmarried daughter of said John B. Helm, deceased.

5 Sixth. Mary N. Helm, unmarried daughter of said John B. Helm, deceased.

2nd. That said John B. Helm, deceased, left a will making said Mary N. Helm, Eliza B. Helm, Sarah C. RoBards, Matilda Johnson, and Maria L. Clayton, and said children of Cyrus T. Helm, deceased, his sole residuary devisees and legatees, and that said John B. Helm, dec'd, left also eight several codicils to said will, the first codicil appointing said John L. RoBards and Joseph J. Johnson his executors, each of said eight codicils confirming said residuary disposal of his residuary estate, and the said eight codicils affecting only the devise of real estate, and in nowise affecting or changing the original testamentary disposition of the personal assets of said estate.

3rd. That on June —, 1872, said two executors propounded said will and eight codicils in the Hannibal probate court for probate in common form, and said probate court admitted said will to probate in common form, but rejected said eight codicils, and on June 21st, 1872, granted letters of administration, with the will annexed, to Mary A. Helm, widow of said testator, and that she duly gave bond and qualified as such, and took charge of and received into her custody as such all the personal assets of said estate, and on June —, 1872, and for more than thirty days thereafter, duly published and gave due notice of her said administration.

4th. That on July 23d, 1872, with the exception of said Matilda Johnson and Maria L. Clayton and their husbands, all said beneficiaries joined in an action in the Hannibal court of common pleas, propounding said eight codicils, as well as said will, for probate in solemn form, the said excepted parties being therein impleaded as codefendants, and that on —— —, 1872, said defendants filed their answer, therein admitting the validity of said will and contesting the validity of said codicils only.

Fifth. That on August —, 1872, said defendants filed in said probate court a motion to appoint an administrator *pendente lite* of said estate.

Sixth. That on August 13th, 1872, after due hearing, said probate court made an order revoking the said letters of said Mary A. Helm because of said contest, and appointed this defendant, Alfred W. Lamb, administrator *pendente lite* of said estate, and duly granted and issued to him letters of administration *pendente lite* therein, and thereupon said Alfred W. Lamb duly gave due bond, conditioned

to faithfully administer said estate, and duly qualified as such administrator *pendente lite*, to wit, during the time of said contest, and duly took charge and possession of all the real estate of said testator, and by compulsory process of said probate court obtained from said Mary A. Helm, as said administratrix, as assets of said estate, the sum of $1,868.64 in cash, and various specific choses in action, to wit, notes, bonds, stock, and railroad tax receipts to the nominal amount of $67,267.52, making in all 69,138.16 dollars of personal assets of said estate received from said administratrix, as well as an account against said John L. Robards, all of which was duly shown in the inventory therein of said administratrix; that on April —, 1873, said Maria L. Clayton died intestate, and her said children were duly substituted; that on November —, 1873, Eliza B. Helm became the wife of Mortimer R. Platt.

6 Seventh. That on May 6th, 1874, the said contest of said codicils—that is to say, the said contest of said will and codicils—was terminated; and on said day said Hannibal court of common pleas, at its May term, 1874, rendered in said cause final judgment, admitting to probate in solemn form said will and said first codicil and five others of said codicils, and rejected the remaining two codicils, and no exceptions were made or taken by any party in said cause, and no motion for rehearing or for new trial or an arrest of judgment was made in said cause, and by means of the premises then and thereby the said will and six codicils, including the said codicils appointing the said John L. RoBards and Joseph J. Johnson executors of said will, were, on said May 6th, 1874, duly and finally adjudged to be and constituted the last will and testament of said John B. Helm, deceased, and on said day said contest was forever ended, and the said letters of administration *pendente lite* were then and thereby revoked, and the said authority of the said Alfred W. Lamb, as said administrator *pendente lite*, then and there ceased.

Eighth. That on May 11th, 1874, said John L. RoBards and Joseph J. Johnson, as said co-executors, duly and jointly made, executed, and filed in said probate court their joint executional bond, as said co-executors, in the sum of one hundred thousand dollars, with good and sufficient sureties thereon, and then and thereby duly bound themselves that they, said co-executors, among other things, would faithfully administer said estate.

Ninth. That on May —, 1874, said Joseph J. Johnson and John L. RoBards, as said co-executors, duly made and filed in said probate court their affidavit that they, as said co-executors, would faithfully administer said estate, and on May 11th, 1874, letters testamentary on said estate by said probate court were accordingly granted and issued to them.

Tenth. That on May 15th, 1874, the said Hannibal probate court made its record entry, finding that the contest of said will and codicils had been finally determined.

Eleventh. That on May 19th, 1874, the said probate court made its further record entry, finding that said contest had been terminated, and thereupon said administrator *pendente lite*, without publishing any notice of his final settlement or his settlement, and with-

out giving notice thereof, appeared in said probate court and filed therein his exhibit for final settlement of his special administration of said estate of said John B. Helm, deceased, showing in the hands of said administrator *pendente lite* all the choses in action and other personal assets of said estate, amounting to 56,136.39 dollars, of which 343 dollars only were in cash, and the remainder consisted of the same notes, bonds, stocks, and tax receipts originally received by said administrator *pendente lite* from said Mary A. Helm, as administratrix, with the will annexed aforesaid, and also showing the said account against said John L. Robards as a claim agreed on by the executors, to wit, a claim adjusted at the sum of $6,271 and reduced to judgment for said amount.

Twelfth. Plaintiff says that at said time said Matilda Johnson and Eliza B. Platt and this plaintiff were married women as aforesaid, and that at said time also the said children of Maria L. Clayton, deceased, were all minors, and that at said time the said children of Cyrus T. Helm, deceased, were all minors.

Thirteenth. Plaintiff says that then and there said probate court fully accepted said exhibit as a final settlement of said special administration by defendant, and made no addition thereto or diminution or alteration therein, and then and there made of record thereon an entry of judgment of final settlement in words and figures as follows, to wit:

7 "May Term, 1874.

"In the Matter of the Estate of JOHN B. HELM, Deceased.

"MAY 19TH, 1874.

"Now, at this day, it appearing to the court that the suit in this estate growing out of the contest over the will of deceased has been terminated, the administrator *pendente lite* makes his final settlement with this court, showing balance in his hands due said estate of fifty-six thousand one hundred and thirty-six dollars and thirty-nine cents ($56,136\frac{39}{100}$), which is ordered to be turned over to the executors of said estate, and on filing in this court the receipt therefor he and his sureties to receive their discharge."

Fourteenth. Plaintiff says that by means of the premises the said finding and order of said probate court, as shown in said entry of record, operated as a judgment in favor of said two executors, as such, against the said administrator *pendente lite* for the said sum of $56,136\frac{39}{100}$ dollars, to be satisfied by his turning over to them said assets to said amount, and that said finding with said order to turn over said assets operated as and was a final judgment of final settlement, as aforesaid.

Fifteenth. The plaintiff says that, by means of their said bond and oath, said two executors were compelled to administer said estate, and that the above-described assets were the only personal assets of said estate, and the said executors could not administer said estate except by receiving said assets so ordered to be turned over to them.

Sixteenth. The plaintiff says that said executors were unable to appeal from said judgment of final settlement without refusing to receive said assets, and it became and was their duty to receive said assets and thereby to forfeit their said appeal.

Seventeenth. The plaintiff says that thereupon, on said May 19th, 1874, the said administrator tendered to said executors the said assets, and said executors accordingly then and there received the same and endorsed on said exhibit of final settlement their receipt therefor in words and figures as follows:

"We, the undersigned, executors of the estate of John B. Helm, deceased, have this day received from Alfred W. Lamb, late administrator *pendente lite* of said estate, all the moneys, bonds, notes, coupons, and all other evidences of debt held by him as administrator as aforesaid and belonging to said estate, as the same at large and more fully appear in the foregoing eight pages of this his second and final settlement.

May 19th, 1874.

JOHN L. RO BARDS,
JOSEPH J. JOHNSON,
Executors of Est. of J. B. Helm, Dec'd.

Eighteenth. Plaintiff says that thereupon, on the same day, the said defendant herein produced in said probate court his said exhibit of final settlement with said receipt thereon, and thereupon said probate court made its entry of record thereon in words and figures as follows, to wit:

"May Term, 1874.

"In the Matter of the Estate of JOHN B. HELM, Deceased.

"MAY 19TH, 1874.

"Now, at this day, Alfred W. Lamb, administrator *pendente lite* of the estate of John B. Helm, deceased, produces into court the receipt of the executors of said estate of John B. Helm for all properties held by him as administrator *pendente lite;* it is, therefore, now ordered that said administrator be discharged."

8 And then and there the said probate court did finally consider and adjudge that said Alfred W. Lamb be discharged from his said administration, and said entries were the only entries made in said matter.

Nineteenth. The plaintiff says that within ten days thereafter one of said executors, said John L. Robards, duly made application and affidavit for appeal from said judgment of final settlement.

Twentieth. Plaintiff says that on April 9th, 1878, one of said executors, Joseph J. Johnson, duly resigned his said executorship and then and there was duly discharged therefrom.

Twenty-first. Plaintiff says that at its October term, 1882, the supreme court of Missouri affirmed the denial of the said application for appeal made by said John L. RoBards as said executor and denied said appeal.

Twenty-second. Plaintiff says that on November, 1883, said sole executor, John L. RoBards, having first published due notice of his final settlement of said estate, filed in the Marion county probate court, sitting at said city of Hannibal, the successor of said Hannibal probate court, his exhibit for final settlement thereof, and that at said time all the debts of said estate had been fully paid and all the assets of said estate collected or received by said executors or by either of them had been duly administered and distributed.

Twenty-third. Plaintiff says that on November, 1883, said probate court duly approved said final settlement and rendered final judgment of final settlement thereon and fully discharged said sole executor.

Twenty-fourth. Plaintiff says that said administrator *pendente lite* did not advertise his intention to make a final settlement of his said administration, as required by section 43 and section 47 of chapter 120 and section 20 of chapter 121 and section 16 of chapter 124 of the General Statutes of Missouri.

The plaintiff says that the said residuary legatees, beneficiaries, and distributees hereinbefore named were not in any way impleaded in said final settlement of said administrator *pendente lite;* that they had no notice thereof; that no process therein, either actual or constructive, was served upon them; that no attempt was made to serve any process on them, either by publication or otherwise; that they made no appearance therein; that no appearance was made for them or entered for them or any of them; that they were nowise represented in said proceeding, and that by means of the premises they were defaulted when in no default, and said final settlement was entirely an *ex parte* proceeding by said administrator *pendente lite.*

Twenty-fifth. The plaintiff says that said two executors, as such, were as aforesaid debarred from claiming, listing, accounting for, or enforcing any demand made against said administrator *pendente lite* on account of his said administration, and by means of the premises no such assets came into the hands of said executor.

Twenty-sixth. Plaintiff says that in and by said final settlement of said administrator *pendente lite* he charged against the said estate and was allowed compensation from the date of his said letters of administration for leasing real estate, collecting rents, attending to repairs and insurance, and paying taxes the sum of ten per cent. on the amounts of rent collected, to wit, on $8,846.90, making the sum of 884.60 dollars so charged and allowed, and said sum of 884.60 dollars was then and there deducted and received by said administrator *pendente lite* in full satisfaction for said services.

9 The plaintiff further says that in addition thereto the said administrator *pendente lite* charged and received allowance for and deducted and retained over one thousand dollars for attorney's fees, clerk's hire, and all other incidental expenses of said administration.

Twenty-seventh. The plaintiff says that said residuary distributees and beneficiaries, to wit, said residuary legatees, were greatly dam-

aged in and by said final settlement of said administrator *pendente lite*, as follows, to wit:

First. The plaintiff says the real amount of expenditures and disbursements made by said administrator *pendente lite*—that is to say, the total amount of assets of said estate administered by him, was 24,103.39 dollars, the same including other than rents, all his receipts of money, to wit, $20,513.92, and the sum of 3,589.95 dollars of said rents so collected as aforesaid, and that said administrator *pendente lite* was not entitled to more than five per centum of said amount of $24,103.39 so administered, to wit, not more than 1,205.20 dollars as such commission, but in and by such final settlement he claimed and was allowed and he deducted and withheld and received and ever since has retained and yet retains five per centum commission on the entire nominal amount of assets received by him as aforesaid from said administratrix, to wit, on the sum of $69,138.16, and also five per centum on the sum of $7,166.23, alleged as accrued interest collected by him.

Plaintiff says that of said assets the said administrator did not administer the following, as shown by his said exhibit of final settlement and in and by said final settlement, as follows, to wit: Notes on hand, 36,501.36 dollars; Hannibal bonds and coupons, 4,667 dollars; Mason township bonds and coupons, 5,390 dollars; stocks, 1,103 dollars; Hannibal & Naples R. R. tax receipts, 1,860.35 dollars; cash, 343.68 dollars, and, on the contrary, the said choses in action, being the same assets received by said administrator *pendente lite* as aforesaid, were by him turned over and delivered to said two executors as so much in satisfaction of said judgment of final settlement, and said 343.68 dollars were likewise so turned over and delivered to said two executors.

Second. The plaintiff says that said administrator *pendente lite* in his said final settlement claimed, charged, and was allowed, and that he collected, received, and withheld and ever since has retained and now retains a commission of five per centum on the amount of a therein-alleged judgment against the said John L. RoBards for 6,271 dollars as so much assets turned over to said executors and not administered.

The plaintiff says that no such assets were administered by said administrator *pendente lite*. The plaintiff says that no such judgment was ever obtained and that no such judgment was ever rendered.

The plaintiff says that upon the installation of said administrator *pendente lite* as such he received from John L. RoBards a statement of the account of John L. RoBards with said late John B. Helm, deceased, showing said John L. RoBards debited with $3,622.74 dollars collected by said John L. RoBards for said John B. Helm in his lifetime, but also showing said John L. RoBards credited with about 75,000 dollars duly paid by said John L. RoBards, omitting credits for his fees and services therein; that thereupon said administrator *pendente lite*, at heavy expense, employed counsel and sued said John L. RoBards for said full sum of $3,622.74 dollars, and

made and filed a new inventory, listing said claim of 83,622.74 dollars against John L. RoBards as newly discovered assets against said estate; that an answer was duly filed claiming said credits as on account current, and while said suit was pending, to wit, on
10 May 6th, 1874, the said contest of said will and codicils was terminated, as hereinbefore alleged, and on May 19th, 1874, the said co-executors, having become duly substituted as coplaintiff executors in said suit, duly agreed upon the amount due, including lawful interest, at the sum of six thousand two hundred and seventy-one dollars aforesaid, and dismissed said suit.

The plaintiff says that, by means of the premises, the same being as fully shown by voucher No. 31 of said final settlement of said administrator *pendente lite*, the said defendant, as said administrator *pendente lite*, withheld and received, and ever since has retained and now retains, as his five per centum commission on 82,575.39 dollars as assets of said estate the sum of 4,128.76 dollars, in addition to the said sum of 884.69 dollars charged for his general services as aforesaid, and that of said five per cent. commission he was and is not entitled to more than the said sum of $1,205.20, and that said judgment of final settlement of his administration, allowing him said sum of $4,128.76 as five per centum commission on said estate, was obtained and rendered without due process of law and in violation of section one of amendment fourteen to the Constitution of the United States, and that said judgment was rendered without jurisdiction in the premises, and that said judgment illegally awarded to said Alfred W. Lamb, as of said five per centum commission, not less than the sum of $2,923.56 of money then and there due from the property of said residuary distributees, legatees, and beneficiaries of said estate, and that said money the said Alfred W. Lamb then and there withheld, received, applied to his own use, and has ever since illegally retained and he now illegally retains the same, and thereby he did not duly administer said estate. The plaintiff says that then and thereby a cause of action vested in the said residuary distributees, legatees, and beneficiaries in said estate to set aside said probate judgment of final settlement of said administrator *pendente lite* and obtain an account with said Alfred W. Lamb of said moneys and recover against him judgment therefor.

The plaintiff says that on October —, 1881, the said Mary N. Helm became the wife of J. F. Davidson, and that on May —, 1881, the said Jennie B. Helm became the wife of Ben. F. Winchell.

The plaintiff says that on August 2nd, 1883, the said Mary N. Davidson and her husband, J. F. Davidson, and Kate P. Helm, Mary Helm, Alice Helm, Henry B. Helm, John C. Helm, and Amy Helm, his wife, Jennie B. Winchell, and Ben. F. Winchell, her husband, and Mary Clayton and Jennie Clayton, in writing, duly made, executed, and delivered to plaintiff their assignment to plaintiff of their said cause of action, and that on August 2nd, 1883, said Matilda Johnson and her husband, Joseph J. Johnson, John B. Clayton, and Lilly Clayton, his wife, Henry H. Clayton, Sr., and Hattie Clayton, his wife, Henry H. Clayton, Jr., and William L. Clayton, in writing, duly made, executed, and delivered to plaintiff their assign-

ment to plaintiff of their said cause of action, and that on August 2nd, 1883, said Eliza B. Platt and Mortimer R. Platt, her husband, in writing, duly made, executed, and delivered to plaintiff their assignment to plaintiff of their said cause of action, and the said parties, said assignors, then and thereby, for value received and without recourse, assigned, transferred, and set over to plaintiff all their right, title, and interest and claim in and to any sum or sums of money that might be due to them as legal representatives of said John B. Helm, deceased, from said Alfred W. Lamb, late administrator *pendente lite* of said estate, growing out of said A. W. Lamb's administration and settlement of said estate as such administrator *pendente lite*.

The plaintiff says that on said August 2nd, 1883, said assignors were all of full age, and that they comprised all of the legal
11 representatives of said John B. Helm and included all the said residuary distributees, legatees, and beneficiaries in said estate of said John B. Helm, dec'd.

Plaintiff says that by means of said assignments and transfers said cause of action above described was conveyed to and wholly vested in this plaintiff, and she, in her own right as well as said assignee, is sole owner thereof to her sole and separate use and benefit.

The plaintiff says that the defendant resides in the said township of Mason, in Marion county, State of Missouri, and is in all respects fully solvent.

The plaintiff says that the said Hannibal court of common pleas has exclusive original jurisdiction of this action as fully as the circuit court might have or exercise.

Wherefore the plaintiff brings this action in equity, and prays the court to set aside the said judgment of final settlement of said administration of said administrator *pendente lite*, and decree that an account be taken, and that the defendant pay to plaintiff, with interest thereon, the said sum of money, the said excess of commission received by defendant; and, further, the plaintiff prays all proper relief.

THOS. H. BACON,
Plaintiff's Attorney.

Summons issued December 28th, 1883; executed December 29th, 1883.

Afterwards, to wit, on the 16th day of January, 1884, and during the regular January term, 1884, of said court, the following, among other, proceedings were had, to wit:

Demurrer Filed.

SARAH C. ROBARDS, Plaintiff,
against
ALFRED W. LAMB, Defendant.

Now, at this day, comes defendant herein, by his attorneys, and files his demurrer to plaintiff's petition, which said demurrer is in words and figures following, to wit:

Demurrer Copied.

STATE OF MISSOURI, } ss:
County of Marion, }

In the Hannibal Court of Common Pleas. January Term, 1884.

SARAH C. ROBARDS, Plaintiff, *vs.* ALFRED W. LAMB, Defendant.

Now, on this day, comes the defendant and demurs to the petition filed in the above-entitled cause, and for this his demurrer assigns the following reasons, to wit:

1st. That there is a defect of parties plaintiff in this: John L. RoBards, plaintiff's husband, is not made a party plaintiff.

2nd. That the petition does not state facts sufficient to constitute a cause of action.

12 3d. That from all the facts stated in the petition there is no equity in the bill, and the plaintiff is not entitled to the relief prayed for or any other relief.

4th. That the whole subject-matter as set out in the petition has been adjudicated and finally determined in courts of competent jurisdiction and courts of last resort, as appears upon the face of the petition.

THOS. F. GATTS AND
J. T. REDD,
Att'ys for Def't.

Afterwards, to wit, on the 18th day of January, 1884, and during the regular January term, 1884, of said court, the following proceedings were had, to wit:

Demurrer Sustained.

SARAH C. ROBARDS, Plaintiff,

against

ALFRED W. LAMB, Defendant.

Now, at this day, come the parties plaintiff and defendant, by their respective attorneys, and the demurrer to plaintiff's petition hereinbefore filed now coming on to be heard is submitted to the court, and the court being fully advised of and concerning the same doth order that said demurrer be, and the same hereby is, sustained.

And afterwards, to wit, on the 19th day of January, 1884, and during the regular January term, 1884, of said court, the following, among other, proceedings were had, to wit:

Motion to Make J. L. RoBards Party Pl'ff Filed.

SARAH C. ROBARDS, Plaintiff,

against

ALFRED W. LAMB, Defendant.

Now, at this day, comes the plaintiff herein, by her attorney, and files motion to make John L. RoBards party plaintiff herein.
(For said motion see page 29.)

And afterwards, to wit, on the 22nd day of January, 1884, and during the regular January term, 1884, of said court, the following, among other, proceedings were had, to wit:

Motion Submitted. Order Overruling.

SARAH C. ROBARDS, Plaintiff,

against

ALFRED W. LAMB, Defendant.

Now, at this day, come the parties herein, by their respective attorneys, and the motion of plaintiff heretofore filed herein to make John L. RoBards a party plaintiff now coming on to be heard is submitted to the court, and the court being fully advised of and concerning the premises doth overrule said motion; and now plaintiff stands on the demurrer and abides by her petition herein. It is therefore considered and adjudged by the court that plaintiff take nothing by her writ herein; that defendant go hence without day and have and recover of plaintiff his costs about this suit expended, and that execution may issue therefor.

13 And afterwards, to wit, on the same day of January, 1884, and during the regular January term of said court, the following, among other, proceedings were had, to wit:

Bill of Ex., Affidavit, & Appeal Bond Filed.

SARAH C. ROBARDS, Plaintiff,

against

ALFRED W. LAMB, Defendant.

Now, at this day, comes the plaintiff herein, by attorney, and files bill of exceptions, signed, sealed, and allowed by the court and ordered to be made a part of the record in this cause; and now said plaintiff files her application, duly verified by affidavit, for an appeal in this cause to the supreme court of Missouri, and also files her bond in appeal in the sum of ($100) one hundred dollars, with

J. M. Armstrong and George A. Hawes as securities thereon. Whereupon the court having duly considered said application for an appeal doth grant the prayer of petitioner and allow an appeal to said supreme court; and the court having seen said appeal bond and being advised thereof doth approve the same and order that supersedeas be allowed herein. It is further ordered by the court that the clerk of this court make a full and complete transcript of all the record and proceedings had in this cause and transmit the same, duly certified, to the clerk of said supreme court.

Which said affidavit is in words and figures following, to wit:

Affidavit for Appeal to Supreme Court.

In the Hannibal Court of Common Pleas, Marion County, State of Missouri.

SARAH C. ROBARDS, Appellant,

vs.

ALFRED W. LAMB, Respondent.

Affidavit of Sarah C. RoBards, plaintiff, appellant.

Sarah C. RoBards states that the appeal of the appellant, plaintiff, in the above entitled cause is not made for vexation or delay, but because this affiant believes that the said appellant is aggrieved by the judgment and decision of the above-named court in said cause.

SARAH C. ROBARDS.

Subscribed and sworn to before me this 22nd day of January, 1884.

JOHN H. FRANKLIN, *Clerk.*

Which said bond is in words and figures following, to wit:

Appellant's Bond.

In the Hannibal Court of Common Pleas, Marion County, State of Missouri.

SARAH C. ROBARDS, Appellant, Plaintiff,

against

ALFRED W. LAMB, Respondent, Defendant.

14 Know all men by these presents that we, Sarah C. RoBards, as principal, and Jesse M. Armstrong and George A. Hawes, as securities, are held and firmly bound unto Alfred W. Lamb, respondent, defendant, in the sum of one hundred dollars; for the payment of which we hereby firmly bind ourselves and our heirs, executors, and administrators—

Upon the following condition, however: That whereas said Alfred W. Lamb has, in the Hannibal court of common pleas, in county

and State aforesaid, in a certain cause therein pending, entitled Sarah C. RoBards against Alfred W. Lamb, recovered a judgment against the said Sarah C. RoBards; and whereas the above-named appellant has, according to law, been granted an appeal to the supreme court of the State of Missouri in said cause:

Now, therefore, if the said Sarah C. RoBards shall prosecute her appeal with due diligence to a decision in said supreme court and shall perform such judgment as shall be given by the said supreme court in the premises and such judgment as the said supreme court shall direct the Hannibal court of common pleas aforesaid to give, and in case the judgment first aforesaid of the last-named court or any part thereof shall by said supreme court be affirmed, if then the said appellant shall comply with and perform the same as far as it may be affirmed and shall pay all damages and costs which may be awarded against the said appellant by the said supreme court, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

In testimony whereof we have hereunto set our hands and seals this — day of January, 1884.

SARAH C. RO BARDS. [SEAL.]
J. M. ARMSTRONG. [SEAL.]
GEO. A. HAWES. [SEAL.]

Approved by me—
THEO. BRACE,
Judge of the Hannibal Court of Common Pleas.

Which said bill of exceptions is in words and figures following, to wit:

Bill of Exceptions.

STATE OF MISSOURI, } ss:
County of Marion, }

Hannibal Court of Common Pleas.

SARAH C. ROBARDS, Plaintiff,
against
ALFRED W. LAMB, Defendant.

Be it remembered that at the January term, 1884, of the above-entitled cause the following proceedings were had in the above-named court:

On January 16th, 1884, the defendant filed his demurrer, and said demurrer, being duly heard by the court, was by the court sustained on January 18th, 1884.

On January 19th, 1884, the plaintiff filed her motion for an order requiring John L. RoBards to be brought in as a party co-
15 plaintiff by amendment of the petition or by supplemental petition and new summons, the said motion, with filing entry, being in words and figures as follows:

Motion to Make J. L. RoBards Party Pl'ff.

STATE OF MISSOURI, } ss:
County of Marion, }

Hannibal Court of Common Pleas.

SARAH C. ROBARDS, Plaintiff,

against

ALFRED W. LAMB, Defendant.

The plaintiff moves the court to grant and make an order for the impleading of the husband of plaintiff herein, to wit, John L. RoBards, and to order said John L. RoBards to be brought in by an amendment of the petition or by a supplemental petition and a new summons, and for all proper relief in the premises.

For reasons for this motion the plaintiff says that on January 15th, 1884, at the present term herein, the defendant filed a demurrer to the petition herein, of which the first ground specified was in words and figures as follows:

"1st. That there is a defect of parties plaintiff in this, John L. RoBards, plaintiff's husband, is not made a party plaintiff."

That is to say, the said demurrer specified as a ground thereof that there is a defect of parties plaintiff in this, that John L. RoBards, plaintiff's husband, is not made a party plaintiff.

The plaintiff further says that on January 18th, 1884, yesterday, said demurrer was sustained in entirety.

The plaintiff says that under said action of the court a complete determination of the controversy cannot be had without the presence of said other party, John L. RoBards.

Wherefore plaintiff prays that said order may be made by the court, and that said John L. RoBards be brought in as coplaintiff herein in manner and form as stated, to the end that plaintiff may secure the relief sought in her petition.

THOMAS H. BACON,
Plaintiff's Att'y.

Filed Jan. 19, 1884.

JNO. H. FRANKLIN, *Clerk.*

Which said motion, being duly heard by the court, was by the court overruled, and to the action of said court in overruling said motion the plaintiff, by her counsel, then and there excepted at the time. The plaintiff then and there presented to the court this her bill of her several exceptions herein and prayed the court to allow, sign, and seal the same and make the same a part of the record herein, which, by the court, is accordingly done.

THEO. BRACE, [SEAL.]
Judge of the Hannibal Court of Common Pleas.

16 And afterwards, to wit, at the April term, 1886, the following proceeding were had in the supreme court of the State of Missouri in said cause, to wit:

Assignment of Errors.

SARAH C. ROBARDS, App., *vs.* A. W. LAMB, Resp.

APRIL 27TH, 1886.

Now comes the appellant and, in the above-entitled cause, wherein Sara C. RoBards is appellant and Alfred W. Lamb is respondent, says that there is manifest error in the record therein, and for error appellant says that the court below erred in sustaining respondent's demurrer and in overruling appellant's motion for the impleading of her husband as coplaintiff, and in rendering against appellant final judgment on said demurrer.

THOMAS H. BACON,
Appellant's Attorney.

Submission.

SARAH C. ROBARDS, App., *vs.* A. W. LAMB, Resp.

APRIL 27TH, 1886.

Comes now the said appellant, by attorney, and, after argument herein, submits this cause to the court; comes also the said respondent, by attorney, and submits this cause to the court on briefs.

17 *Judgment.*

SARAH C. ROBARDS, Appellant, *vs.* A. W. LAMB, Respondent.

Appeal from Hannibal court of common pleas.

JUNE 7TH, 1886.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid by the said Hannibal court of common pleas rendered, be in all things affirmed and stand in full force and effect; and it is further considered and adjudged by the court that the said respondent recover against the said appellant his costs and charges herein expended and have therefor execution.

Opinion Filed.

Which said opinion is in words and figures as follows, to wit:

18 *Opinion of the Court.*

In the Supreme Court of Missouri. April Term, 1886.

SARA C. ROBARDS, App., *vs.* ALFRED W. LAMB, Resp.

This is an appeal from a judgment of the Hannibal court of common pleas sustaining a demurrer to the petition. The suit is in equity and the petition discloses the following facts:

In 1872 John B. Helm died at Hannibal, Missouri, leaving a will and eight codicils. In one of the codicils John L. RoBards and Joseph J. Johnson were appointed executors. The will was admitted to probate, but the codicils were rejected by the probate court. The widow of the testator was appointed administratrix with the will annexed.

Certain of the devisees and legatees instituted a suit to contest the will as probated, and sought to have the same and the codicils established. Pending this suit, and on the 13 August, 1872, the probate court revoked the letters of administration granted to the widow and appointed the defendant in this suit administrator *pendente lite.*

On the 6 May, 1874, the controversy over the will terminated in a judgment establishing the will and six of the codicils, including the one appointing RoBards and Johnson executors. Thereupon letters testamentary were issued to them and they qualified by giving bond, etc.

Afterwards, and on the 19 May, 1874, the defendant, as admin-
19 istrator *pendente lite*, filed his settlement in the probate court, which settlement disclosed a balance of assets in his hands of $56,136.39, consisting of a few hundred dollars in money, bonds, notes, and the like. On the same day the probate court made an order reciting the fact that the will and codicils had been established, and also stating that the administrator had filed his settlement disclosing the above balance in his hands, and ordered the same to be turned over to the executors nominated by the will, and that he should be discharged upon filing their receipt therefor; and on the same day he filed in that court their receipt acknowledging the delivery to them of "all the moneys, bonds, notes, coupons, and other evidences of debt," as shown and disclosed by the settlement, and thereupon and on the same day the court made an order discharging the administrator *pendente lite.* From this order Mr. RoBards, one of the executors, prosecuted an unsuccessful appeal, the history of which is set out in the petition and will be found in 76 Mo., 192.

One of the executors resigned in 1878 and Mr. RoBards, the other one, made final settlement of the estate in 1883. After this settle-

ment the plaintiff, who is the wife of RoBards and one of the residuary legatees, commenced this suit. Besides the facts before stated, it is alleged that the defendant kept and retained commissions, to which he was not entitled, to the amount of over two thousand dollars, and that the plaintiff has acquired by assignment from the other residuary legatees their right to have and recover from defendant these excessive commissions.

There can be no doubt but the order of the probate court approving the settlement made by the administrator pending the will suit and discharging him upon filing the receipt of the executors is a judgment and must be treated as a judgment of a
20 court having full and complete jurisdiction of the subject-matter.

When the case of RoBards, executor, *vs.* Lamb was here it was distinctly held that the executors received and receipted for the money and property ordered to be turned over to them, and thereby accepted the fruits of the judgment in their own favor. They could not prosecute an appeal from the judgment which they had thus satisfied.

The plaintiff seeks to avoid the force of that adjudication and the binding force of the judgment approving the settlement and discharging the administrator by showing, and the fact is admitted, that the administrator gave no notice of his intention to make the settlement, and because of which it is claimed the judgment is void as to the plaintiff. This presents the inquiry whether any notice was required to be given.

All executors and administrators are required to make annual settlements, the details of which are defined by law. Sections 16 to 19, chap. 124, G. S., which are the same as sections 238 to 241, R. S. 1879, provide that if any administrator wish to make final settlement he shall give notice of his intention so to do for four weeks by publication, etc., and the court must find that such notice had been given. His accounts are then stated, allowances made for insolvent assets, and uncollected notes, accounts, etc., may be sold. It is clear the final settlement here contemplated is that to be made at the end of the administration of the estate. There is, then, no representative of the estate with whom he makes the settlement save the creditors and distributees themselves, and hence the notice that all may be brought before the court.

The defendant was appointed by virtue of section 13, chap. 120, G. S., being sec. 14, R. S. 1879, which says: If the validity of a will
21 be contested or the executor be a minor, letters of administration shall be granted during the time of such contest to some other person, "who shall take charge of the property and administer the same according to law under the direction of the court, and account for and pay and deliver all the moneys and property of the estate to the executor or regular administrator, when qualified to act." As was said in Lamb, adm'r, *vs.* Helm, adm'x, 56 Mo., 433, "such special administrators occupy more nearly the position of a receiver who acts under the direction of the court than they do the position of a general administrator." The special administrator

is appointed for temporary purposes only (Hawkins *vs.* Cunningham, 67 Mo., 415), and when the contest as to the will is over the nominated executor qualifies, his functions are at an end, and he must settle his accounts and turn over the property in his hands to the regular executor or administrator. This accounting is his final accounting, it is true, but it is not a final settlement of the estate contemplated when notice is required to be given. There is no need of any notice, for there is then a regular representative of the estate with whom the settlement is made under the direction of the probate court. The statute which provides for notice on final settlements therefore has no application to settlements made by an administrator *pendente lite*, and notice is not required.

As to sec. 47, chap. 120, which provides that if any administrator die, resign, or his letters be revoked, he or his legal representatives shall account to the successor, etc., it is sufficient to say the section has no application to this case, for here the special administrator neither resigned nor were his letters revoked, but his powers ceased by operation of law and the express terms of the appoint-
22 ment. We do not intimate that in these cases notice of the settlement must be given, though when an administrator desires to resign notice of his intention to make application to that end must be given.

It follows that the judgment of the probate court discharging the special administrator is final and conclusive even as against the plaintiff, for there is no saving clause as to minors or married women. The petition does not seek relief on the ground of fraud. The judgment in this case is therefore affirmed.

All concur.

F. M. BLACK, *J.*

23 JUNE 16TH, 1886.

* * * * * * *

SARAH C. ROBARDS, App., *vs.* A. W. LAMB, Resp.

Come- now the said appellants, by attorneys, and file- motion for a rehearing of these causes, which said motion for a rehearing is in words and figures as follows, to wit:

Motion for Rehearing.

Supreme Court of Missouri.

SARAH C. ROBARDS, Appellant,
vs.
ALFRED W. LAMB, Respondent. } No. 3050.

Appeal from Hannibal court of common pleas.

The appellant comes and prays a rehearing of the opinion in the above-entitled cause, because said opinion appears to be in conflict with the decision in the case of State *ex rel.*, &c., *vs.* Donegan, 83 Mo., 374, which case was not cited in appellant's brief because at the time

said original brief was filed said decision, if published at all, was not officially published and was unknown to appellant, and although said case was cited in appellant's supplemental brief in reply, there being no rule of court providing for brief in reply, the said citation appears to have been lost, the same as if overlooked by counsel; and also the inadvertent failure of appellant to cite in the original
24 brief the case of Riley *vs.* Renshaw, 52 Mo., 224, lead- the appellant to similarly recite that decision as in conflict with the opinion herein.

THOMAS H. BACON,
Attorney for Appellant.

On the back of said motion appear the following endorsements:

To William C. Foreman, attorney for respondent:

Take notice that within ten days after the deliverey of the opinion in the above-entitled cause the within-named appellant will file in the said supreme court a motion for rehearing, of which the foregoing is a true duplicate original copy.

THOMAS H. BACON,
Attorney for App'l't.

At the city of Hannibal, county of Marion, State of Missouri, on this 14th day of June, 1886, I delivered to the above-named William C. Foreman, in person, attorney for said respondent, a true duplicate original copy of above motion and of above notice.

JAMES THAD. RAY,
Sheriff of Marion County, Missouri,
By JOHN CARBER,
Deputy Sheriff.

25 JUNE 21ST, 1886.

* * * * * * *

SARAH C. ROBARDS, App., *vs.* A. W. LAMB, Resp.

* * * * * * *

Now, at this day, the court, having fully considered and understood the motions heretofore filed for a rehearing of the above cause, doth order that said motions be, and the same are hereby, overruled.

And afterwards, to wit, on September 13th, 1887, in vacation of court, at chambers, the following further proceedings were had in said cause, to wit:

SARAH C. ROBARDS, App., *vs.* A. W. LAMB, Resp.

Now, at this day, there is presented to the Honorable Elijah H. Norton, chief justice, at chambers, a writ of error to reverse the

judgment in the above cause, a citation directed to the said defendant citing and admonishing him to be and appear at a Supreme Court of the United States on the second Monday of October next; also a supersedeas bond in the sum of $500; which said writ of error is allowed, said citation signed, and bond approved and ordered to be filed and made a part of the record herein; and thereupon is is further ordered that a supersedeas be granted staying all further proceedings upon the judgment herein until the determination of this cause in the Supreme Court of the United States.

26 Which said bond is in words and figures following, to wit:

Know all men by these presents that we, Sara C. RoBards, John L. RoBards, and James B. Bowles, are held and firmly bound unto Alfred W. Lamb in the full and just sum of five hundred dollars, to be paid to the said Alfred W. Lamb, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at the April term, 1886, of the supreme court of the State of Missouri, in a suit depending in said court between Sara C. RoBards, plaintiff and appellant, and Alfred W. Lamb, defendant and respondent, judgment was rendered against the — Sara C. RoBards, and the said Sara C. RoBards having obtained a writ of error of the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said Alfred W. Lamb citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Sara C. RoBards shall prosecute said writ of error to effect and answer all damages and costs if she fail to make good her plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

SARA C. ROBARDS. [SEAL.]
JOHN L. ROBARDS. [SEAL.]
JAMES B. BOWLES. [SEAL.]

Approved by—
E. H. NORTON,
Chief Justice Supreme Court Missouri.

27 STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remain on file and of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court. Done at office, in the city of Jefferson, this 15th day of September, A. D. 1887.

[Seal Supreme Court of Missouri.]

HENRY W. EWING, *Clerk*,
By ROWAN RAY, *D. C.*

[Endorsed:] No. —. — term, 188-. Sarah C. RoBards *vs.* Alfred W. Lamb. — circuit court, — circuit. —— ——, att'y for —; —— ——, att'y for —. Filed —— —, 188-. —— ——, clerk, by —— ——, D. C. $17.00, transcript fee, paid by Jas. Carr. $10.00, docket fee, paid by —— ——.

Endorsed on cover: Missouri supreme court. No. 1088. Sarah C. RoBards, plaintiff in error, *vs.* Alfred W. Lamb. Filed October 3, 1887.

24-58

FILED
FEB 27 1888
JAMES H. McKENNEY

—IN THE—

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1887.

SARAH C. ROBARDS,
Plaintiff in Error,
—vs.—
ALFRED W. LAMB.

No. 1088.

IN ERROR ~~FROM~~ to THE SUPREME COURT OF MISSOURI.

Brief in Opposition to Motion to Dismiss for want of Jurisdiction.

JAMES CARR,
For Plaintiff in Error.

—IN THE—

SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1887.

SARAH C. ROBARDS,
Plaintiff in Error,
—vs.—
ALFRED W. LAMB.

No. 1088.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT OF THE CASE.

On the 27th day of December, 1883, the plaintiff in error filed a bill in equity in the Hannibal court of common pleas against the defendant in error, in which she alleged, that John B. Helm, of the city of Hannibal and State of Missouri, died on the 1st day of June, 1872, first having made his last will with eight codicils. That he left the persons named in the bill, who were his children (plaintiff being one of them), grandchildren and widow, his sole residuary

devisees and legatees; and in the first codicil he appointed John L. RoBards and Joseph J. Johnson the executors of said will and codicils.

That on June , 1872, said executors propounded said will and codicils in the Hannibal probate court for probate in common form, and said probate court admitted said will to probate in common form, but rejected said eight codicils, and on the 21st day of June, 1872, granted letters of administration, with the will annexed, to Mary A. Helm, widow of said testator, and she duly qualified as such, and took charge of all the assets of said estate and was administering the same, when all of the beneficiaries under said will and codicils, except Matilda Johnson and Maria L. Clayton and their husbands, joined in an action in the Hannibal court of common pleas against said last named parties, propounding said eight codicils, as well as said will, for probate in solemn form.

That, on motion of said defendants, on August 15th, 1872, said probate court revoked the letters of said Mary A. Helm as administratrix of said estate, because of said contest, and appointed the defendant, Alfred W. Lamb, administrator *pendente lite* of said estate, and thereupon said defendant gave bond and duly qualified as such administrator *pendente lite*, and took charge and possession of all the real estate, and he obtained from said Mary A. Helm, as administratrix, as assets of said estate, $1,868.64 in cash, and notes, bonds, stock and railroad tax receipts to the amount of $67,267.52, making in all $69,138.16 of assets of said estate received from said administratrix, as well as an account against said John L. RoBards.

That, on the 6th day of May, 1874, said will and said first codicil and five others were by the judgment of said Hannibal court of common pleas admitted to probate in solemn form, and the two remaining codicils were rejected,

and the contest in regard to said codicils was terminated, and the said letters of administration granted to the defendant *pendente lite*, were then and thereby revoked.

That, on the 11th day of May, 1874, letters testamentary were duly granted by said probate court to said John L. RoBards and Joseph J. Johnson, and they gave bond, duly qualified and entered upon the execution of said will and codicils. On the 15th day of May, 1874, said probate court made an entry of record, finding that said contest had been terminated, and thereupon the defendant as administrator *pendente lite*, without publishing any notice of his final settlement, and without giving notice thereof, appeared in said probate court and filed therein his exhibit for final settlement of his special administration of said estate, showing in his hands assets thereof, amounting to $56,136.39, of which $343 only were in cash, and the remainder consisted of the same notes, bonds, stocks and tax receipts, originally received by defendant as administrator *pendente lite*, from said Mary A. Helm, as administratrix, as aforesaid; and also showing the said account against said John L. RoBards, as agreed on and adjusted by the executors at $6,271.

That, said probate court accepted said exhibit as a final settlement of said administration by defendant, without any addition thereto or diminution or alteration therein, and it ordered defendant to turn over to said executors said sum of $56,136,39, and on his said filing in said court the receipt therefor, he and his sureties to receive their discharge. (Record, p. 6.)

That said order of said probate court operated as a judgment in favor of said executors against the defendant as administrator *pendente lite* for said sum, and was a final settlement of said special administration. That all the assets of said estate were in the hands of the defendant. That

said executors could not appeal from said final settlement and judgment without refusing to receive said assets, and it became and was their duty to receive said assets and thereby forfeit their appeal. That on the 19th day of May, 1874, the defendant tendered to the said executors the said assets, and the said executors then and there received the same and endorsed on said exhibit their receipt therefor in words and figures as follows:

(See Trans. Record, p. 7.)

"We, the undersigned, executors of the estate of John B. Helm, deceased, have this day received from Alfred W. Lamb, late administrator *pendente lite* of said estate, all the moneys, bonds, notes, coupons, and all other evidences of debt held by him as administrator as aforesaid and belonging to said estate, as the same at large and more fully appear in the foregoing eight pages of this, his second and final settlement.

JOHN L. ROBARDS,
JOSEPH J. JOHNSON,
Executors of Est. of J. B. Helm, Dec'd."

May 19th, 1874.

The defendant, the same day produced in said probate court his said exhibit with said receipt endorsed thereon, and thereupon said probate court made an order discharging the defendant as administrator *pendente lite* of said estate.

That at the time of the defendant's filing his said exhibit in said probate court, and said court's approving the same, the plaintiffs, Matilda Johnson and Eliza B. Platt, daughters of the testator, were married women, and the five children of Cyrus T. Helm, deceased, who was a son of the testator, were all minors, and the five children of Maria L. Clayton, a daughter who died on April , 1873, were all minors. (Record, p. 6.)

That within ten days after the approval of said exhibit by said probate court—the time prescribed by the statute in such cases—John L. RoBards, one of said executors, made affidavit and application for an appeal from said judgment approving said exhibit and then took an appeal to the honorable court of common pleas; on motion of the defendant, it was dismissed without any hearing on the merits, and said judgment was affirmed by the Supreme Court of Missouri at the October Term thereof, 1882. (See 76 Mo., p. 192.)

On the 9th of April, 1879, Joseph J. Johnson resigned as executor, and on November , 1883, John L. RoBards, the other executor, having first published due notice of his final settlement of said estate, filed in the probate court his final settlement, and the same was by said court approved and he was fully discharged.

Plaintiff avers that the said legatees, beneficiaries and distributees under said will and codicils had no notice, either actual or constructive, of said final settlement of the defendant as administrator *pendente lite* of said estate; that they made no appearance and they were in nowise represented in said proceeding, and that by means of the premises they were defaulted when in no default, and said final settlement was entirely an *ex parte* proceeding by the defendant as administrator *pendente lite;* and said executors were debarred as aforesaid from claiming or enforcing any demand against the defendant for the improper retention of any money or assets belonging to the said estate.

That in and by said final settlement of the defendant as administrator *pendente lite* he charged against said estate and was allowed compensation from the date of his letters of administration for leasing of real estate, collecting rents, attending to repairs and insurance, and paying taxes, ten per cent. on the aggregate amount, $8,846.90, thus making the

sum of $884.60 charged and allowed for said services; and in addition thereto the defendant charged and was allowed in said settlement, over $1,000 for attorney's fees, clerk's hire and other incidental expenses of his said administration.

That the total amount of expenditures and disbursements made by the defendant as administrator *pendente lite*, that is to say, the total amount of assets of said estate administered by him, was $24,103.39, and he was not entitled to more than five per cent. commission on said amount, to-wit: not more than $1,205.20.

That the defendant did not administer the following assets belonging to said estate, to wit: Notes on hand, $36,501.36; Hannibal bonds and coupons, $5,390; stocks, $1,103; Hannibal & Naples R. R. tax receipts, $1,860.35; cash, $343.68; amounting to the sum of $49,865.39. That said assets were the same which he had received from Mary A. Helm as administratrix of said estate.

That the defendant in his said final settlement charged and was allowed the commission of five per cent. on the sum of $6,271, as the amount of the claim against John L. RoBards, which had been agreed on by the executors of said will. That the defendant never collected said claim, and it was not assets of said estate administered by him; no judgment was ever rendered against said John L. RoBards, on said claim, the suit brought therefore, against him having been dismissed before said settlement was filed and approved. (Record, pp. 9 and 10.) And he was not entitled to charge or to be allowed any commission thereon; and that he was not entitled to charge or to be allowed any commission on said assets, which he had received from Mary A. Helm, as administratrix, and which remained in specie in his hands when he made his final settlement. That said assets, not administered upon by the defendant as afore-

said, amount to the sum of $58,472; and the commission charged thereon, and allowed by said probate court in defendant's said final settlement amounts to the sum of $2,923.56, and said unadministered assets were by the defendant turned over on the 19th day of May, 1874, to said executors, and received by them in specie on said settlement, as shown by their receipt hereinbefore copied. (Record, p. 7.)

The bill then contains the following averment: That the defendant had obtained the allowance of $2,923.56 commission on said unadministered assets, without "due process of law," and in violation of section one of amendment fourteen to the Constitution of the United States, viz:

(See Record, p. 10.)

"The plaintiff says that, by means of the premises, the same being fully shown by voucher No. 31 of said final settlement of said administrator *pendente lite*, the said defendant, as said administrator *pendente lite*, withheld and received, and ever since has retained and now retains, as his five per centum commission on 82,575.39 dollars as assets of said estate the sum of 4,128.76 dollars, in addition to the said sum of 884.69 dollars charged for his general services as aforesaid, and that of said five per cent. commission he was and is not entitled to more than the said sum of $1,205.20, and that said judgment of final settlement of his administration, allowing him said sum of $4,128.76 as five per centum commission on said estate, was obtained and rendered without due process of law and in violation of section one of amendment fourteen to the Constitution of the United States, and that said judgment was rendered without jurisdiction in the premises, and that said judgment illegally awarded to said Alfred W. Lamb, as of said five per centum commission, $2,923.66 of money then and there due from the property of said residuary distributees, legatees, and beneficiaries of said estate, and that said money the said Alfred W. Lamb then

and there withheld, received, applied to his own use, and has ever since illegally retained and he now illegally retains the same, and thereby he did not duly administer said estate. The plaintiff says that then and thereby a cause of action vested in said residuary distributees, legatees, and beneficiaries in said estate to set aside said probate judgment of final settlement of said administrator *pendente lite* and obtain an account with said Alfred W. Lamb of said moneys and recover against him judgment therefor."

The plaintiff states that all of the other legatees and beneficiaries under said will duly assigned their several claims and causes of action against the defendant to plaintiff. (Record pp. 10 and 11.)

Prayer of the bill is to set aside said judgment approving said final settlement of the defendant as administrator *pendente lite*, and decree that an account be taken, and that the defendant pay to plaintiff, with interest thereon, the said excess of commission received by defendant; and for all proper relief.

At the January term, 1884, of the Hannibal court of common pleas the defendant demurred to the plaintiff's bill, assigning the following reasons, viz:

1st. That there is a defect of parties plaintiff in this: John L. RoBards, plaintiff's husband, is not made a party plaintiff.

2d. That the petition does not state facts sufficient to constitute a cause of action.

3d. That from all the facts stated in the petition there is no equity in the bill, and the plaintiff is not entitled to the relief prayed for or any other relief.

4th. That the whole subject matter as set out in the

petition has been adjudicated and finally determined in courts of competent jurisdiction and courts of last resort, as appears upon the face of the petition.

The Hannibal court of common pleas sustained the demurrer.

A motion was then filed by the plaintiff to make her husband a co-plaintiff. This motion was overruled. The plaintiff stood upon the demurrer, and final judgment was rendered against her. She appealed to the Supreme Court of Missouri, which, on the 7th day of June, 1886, affirmed the said judgment. The opinion delivered in the Supreme Court of Missouri is copied into the record in full (p. 18). A motion for a rehearing was filed and overruled, and on the 27th day of August, 1887, a writ of error to the Supreme Court of Missouri was sued out and the case brought to this Court.

The defendant makes a motion to dismiss the writ of error or to affirm the judgment herein, on two grounds, viz:

1. This Court is without jurisdiction under section 709 of the Revised Statutes.

2. If any question cognizable under that section was in fact decided, such decision was not necessary, and the judgment rendered is supported on grounds which this Court has no jurisdiction to review.

BRIEF.

In opposition to defendant's motion, the plaintiff affirms the following propositions, viz:

1. There is a Federal Question presented by the record, and this Court has jurisdiction under section 709 of the Revised Statutes to decide said question.

2. A question cognizable under that section was in fact decided, such decision was necessary, is erroneous, and the judgment rendered is not supported on grounds which this Court has no jurisdiction to review.

The Federal Question will be first presented:

I.

The plaintiff alleges and specially sets up in her bill that "the judgment of the ~~Honorable~~ Hannibal Probate Court, rendered without notice to her, allowing the defendant $2,923.56 commission on assets of the estate of John B. Helm, deceased, not administered by the defendant as administrator *pendente lite*, 'deprived' her of her 'property,' 'without due process of law' and in violation of section one of amendment fourteen to the Constitution of the United States."

The right thus set up has been denied by the judgment of the highest court in the State. This judgment is erroneous. It presents a Federal Question in the very language of the Constitution itself, and in such case this Court has jurisdiction under section 709 of the Revised Statutes to re-examine it.

II.

The Federal Question presented by the record stands in front of the other question in this case, and must control the whole case.

There is no other question in the case except the validity of the judgment of the probate court, approving the final settlement of the defendant as administrator *pendente lite*, and the plaintiff, not having any notice of that settlement, the probate court had no jurisdiction over plaintiff, and its judgment is not binding on her.

The merits of the case cannot be reached until the Federal Question is decided. The other question is not sufficiently broad to maintain by itself the judgment of the Supreme Court of Missouri, notwithstanding the error in the decision of the Federal Question.

1. It is alleged in the bill, that the defendant published no notice of his final settlement, (Record pp. 5 and 6;) that the plaintiff and the other residuary legatees and beneficiaries under the will had no notice of said settlement, actual or constructive; that they made no appearance therein; that they were nowise represented in said proceeding; and said final settlement was entirely an *ex parte* proceeding by said administrator *pendente lite*. (Record p. 8.) The demurrer admits this allegation to be true.

No person is or can be bound by the judgment of any court or other judicial proceeding without *notice*, actual or constructive; and he must have his day in court, and opportunity to disprove the claim and show cause, if he can, why he should not be "deprived" of his "property."

Annual settlements of executors are not conclusive. They are only *prima facie* evidence of their correctness,

They are always open to corrections for overcharges, fraudulent charges, errors and omissions of every kind. Final settlements, however, are conclusive in actions *at law* for the reason that due *notice* thereof, is required to be published for four weeks.

Sec. 216, Chapter 124, Gen'l Stat. Mo. 1907

The defendant, as administrator *pendente lite* was clothed with all the powers and functions, and was required to "take charge of the property and administer the same according to law" just the same as a regular administrator, and his illegal acts, while administering the estate of plaintiff's father, affected her just as injuriously as if they had been performed by a regular administrator or the executor.

Sec. 213, Chapter 120, Gen. Stat. Mo. 1906

He should be held to the same measure of responsibility as a regular administrator.

The statute of Missouri authorizes the probate court to allow all administrators all reasonable charges "for leasing real estate, legal advice and service, and collecting and preserving the estate, and, as *full* compensation for their services and trouble, a commission of five per cent. on personal estate and on the money arising from the sale of real estate."

Sec. 219, chapter 124, Gen. Stat. Mo. 1906

The probate court allowed the defendant ten per cent. ($884.69), for leasing real estate and collecting rents, on the amount collected; over $1,000 attorney's fees, clerk's hire, and all other incidental expenses of said administration; and five per cent ($4,128.76) on the whole *nominal* assets of the estate ($82,575.39). Of this amount he only administered

$24,103.39. This leaves the sum of $58,392 which he never administered, and upon which he was illegally allowed a commission of five per cent., amounting to $2,923.56. The defendant turned over to the executors in specie the same notes, Hannibal bonds and coupons, Mason township bonds and coupons, and Hannibal & Naples railroad tax receipts which he had received from Mary A. Helm as administratrix, and the claim against John L. RoBards, and the interest alleged to have accrued on said assets in payment of the assets admitted by his *ex parte* settlement to be in his hands. These were the assets not administered by him upon which he was illegally allowed a commission of five per cent. Mary A. Helm was duly appointed administratrix and was the legal administratrix until she was removed in consequence of the contest over the codicils to the will. She was just as well entitled to five per cent. commission on said unadministered assets turned over to the defendant as the defendant. He turned over the same unadministered assets to the executors. They administered them. They then were entitled to five per cent. commission on said assets. Here, then, would be a commission of fifteen per cent., upon the theory of the defendant's allowance, taken out of the estate for administering it, when the statute expressly says that "a commission of *five* per cent. on personal estate shall be "a *full* compensation for their services and trouble." This shows the illegality of the allowance of commission to the defendant on said unadministered assets.

9, chapter 124, Gen. Stat. Mo. 1906

There was no *privity* between the plaintiff as residuary legatee and devisee under the will of John B. Helm and the defendant as administrator *pendente lite*; nor is there any *privity* between the plaintiff as such legatee and devisee and the executors of said will. Their legal relation to each other is that of antagonism of interests. Hence the plaintiff was

not bound by the defendant's *ex parte* settlement in the absence of a legal *notice*, actual or constructive.

PRIVITY.

Bigelow on Estoppel, 139 (4 ed.)
Robertson vs. Wright, 17 Grat. 534.
Hopkins vs. McCann, 19 Ill. 113.
Russell vs. Place, 94 U. S. 606.
Edward vs. Crenshaw, 39 U. S. 166.
Payne vs. Hook, 7 Wall. 425.
Deneale vs. Stumps, Extr. 8 Pet. 528.
Stone vs. Wood, 16 Ill. 177.
Garnett vs. Macon, 6 Call. 308.

There being no *privity* between the plaintiff and the executors of said will, the abortive appeal taken by them from the judgment of the probate court approving said final settlement, does not estop the plaintiff from maintaining this suit in equity to surcharge and falsify said settlement.

When there are fraudulent claims or illegal credits allowed in the settlement of an executor or administrator, and he has given legal notice of his final settlement, and has made it, and it has been approved by the probate court, and he has been discharged, the probate court has no longer jurisdiction over him. The judgment of approval is *res adjudicata*, and it cannot be questioned in an action at *law*. The only way by which it can be reached, is by a suit in *equity*.

If the defendant had given legal *notice* of his final settlement, then it would have been *res adjudicata*, and it could only be impeached by a suit in *equity* for fraud, illegality, error, mistake or omission. As no *notice* of said settlement was given, it is open to impeachment for the *illegal*

commissions on the assets not administered by the defendant, allowed by the judgment of the probate court.

The Supreme Court of Missouri has in this case construed the statute of the State of Missouri in regard to whether it is the duty of an administrator *pendente lite* to give *notice* of his accounting after the contest as to the will is over, and it has said: "This accounting is his final accounting, it is true, but it is not a final settlement of the estate contemplated, when notice is required to be given. *There is no need of any notice*, for there is then a regular representative of the estate, with whom the settlement is made, under the direction of the probate court. *The statute which provides for notice on final settlements, therefore, has no application to settlements made by an administrator pendente lite, and notice is not required.*" (Record p. 21.)

There is no *privity* between the plaintiff and the regular representative of the estate, any more than there was between the plaintiff and the temporary representative.

The attempted appeal by the former could not, and does not, estop her from asserting her rights against the latter for the illegal commission received by him out of her residuary legacy. No one is estopped by the act of the regular representatives in giving the receipt for the assets and money turned over to them by the temporary representative but themselves. A receipt theretofore had always been open to explanation by evidence *aliunde;* but in this particular instance the Supreme Court of Missouri treated it as a satisfaction of the *ex parte* settlement of the temporary representative of said estate, which the probate court had approved, and denied them the right to explain this receipt or to question the *legality* of the $2,923,56 commissions on assets not administered by the defendant. This was on the doctrine of *res adjudicata*. No *notice* of this *ex parte* settlement was given by the administrator *pendente lite*. The record does

not show that the executors appeared to it. The question of the *legality* of these commissions has never been heard in any court. The Supreme Court of Missouri cut the executors off by a *technicality*—treating the giving of the receipt by the executors for the assets and money shown by the defendant's final settlement as a satisfaction of the judgment of the probate court approving said settlement, and then refused to go into the *legality* of said commissions. It thus allowed a technicality to stand in the way and prevent an inquiry into the *merits* of this controverted allowance. Then when the plaintiff sues in equity and alleges that the commissions on the assets not administered by the defendant were and are *illegal*; that she had *no notice* of said final settlement wherein said illegal fees were allowed; that she never appeared; that she was in nowise represented when said settlement was made; that by the allowance of said illegal commissions she has, in the words of the first section of the fourteenth amendment to the Constitution of the United States, been "deprived" of her "property without due process of law"— the Supreme Court of Missouri answers this bill of complaint and says that "*no notice* is required," by the statute of the State of Missouri when an administrator *pendente lite* makes his final settlement, and that "the judgment of the probate court discharging the special administrator is final and conclusive, even as against the plaintiff, for there is no saving clause as to minors or married women." (Record, p. 20.)

Now, this is precisely what the plaintiff complains of; and because the statute did not require the defendant to give *notice* of his final settlement and the judgment of the probate court approving said settlement without any *notice* thereof, is held by the Supreme Court of Missouri to be "final and conclusive even as against the plaintiff," without notice, she says that she has been "deprived" of her "property without due process of law."

Says Chief Justice Waite, in delivering the opinion of this Court, in the case of Arrowsmith vs. Harming, (118, U. S. 194.)

"The legislature of a State performs its whole duty under the Constitution, in this particular when it provides a law for the government of its courts while exercising their duty, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts, and the parties are left to the appropriate remedies for the correction of errors in judicial proceedings."

The legislature of Missouri has not performed its duty under the XIVth amendment to the Constitution of the United States in not providing a law requiring an administrator *pendente lite* to give *notice* of his final settlement.

Even if it should be held that the statute does require that the defendant should have given *notice* of his final settlement, and that the Supreme Court of Missouri has misconstrued it, then it is averred that the judgment of the probate court approving said settlement is not binding or conclusive on the plaintiff, because she had *no notice* of said settlement. If said judgment should be held to be binding or conclusive on plaintiff without *notice*, then she would *be* "deprived" of her "property without due process of law." There can be no "due process of law" without *notice*. It is the basis of all legal procedure. Notice, actual or constructive, must be given in every action or proceeding *in personam* in order that the court may acquire jurisdiction over the party and thus make its judgment binding and conclusive.

Webster vs. Reid, 11 How. 437.
Lessee of Walden vs. Craig's Heirs, 14 Pet. 154.
Hollingsworth vs. Barbour, 4 id. 475.
Thatcher vs. Powell, 6 Wheat. 119.

Even ~~Where~~ in a proceeding *in rem* no judgment or decree is binding without *notice*.

The Mary, 9 Cranch, 126.

The validity of the statute in regard to the duties of an administrator, *pendente lite* has been drawn in question in this case, on the ground that it has not provided for his giving notice of his final settlement, and for that reason it is repugnant to the first section of the XIVth amendment to the Constitution of the United States. The protection of this provision in the Constitution is expressly set up in the bill in this case. Section 709 of the Revised Statutes of the United States does not specify how the right claimed shall be set up. In one case it was set up *orally*.

Des Moines Nav. & R. R. Co. vs. Iowa Homestead Co., 8 Sup. Court Rep., on p. 218.

In this case it was specially set up in the court of first instance. The defendant demurred to the plaintiff's bill. That court sustained the demurrer. The plaintiff stood on the demurrer and appealed the case to the Supreme Court of the State. In that court the plaintiff assigned as error the sustaining of the defendant's demurrer, and in rendering judgment against plaintiff. The plaintiff had once alleged that she had been "deprived" of her "property without due process of law."

That allegation was admitted by the demurrer. It was not necessary to reiterate the same words in the assignment of errors. It was reiterated in legal effect by assigning the sustaining of the demurrer, and in rendering judgment against the plaintiff. The petition or bill is a part of the record. So is the demurrer and so is the assignment of errors. Ah! but says the defendant in his Brief: "No question was either *raised* or *presented* to the Supreme Court of Missouri, or *passed* upon by that Court as to the consti-

tutionality of the statute under which the settlement of defendant was made, and upon which the opinion of the Court was based."

Now, plaintiff affirms that the constitutionality of said statute was *raised;* it was directly and squarely *presented* to the Supreme Court of Missouri, and it was passed on. It has already been shown how it was raised and presented. How was it *passed* on?

The statute in question nowhere provides or requires an administrator *pendente lite* to give *notice* of his final settlement, and the defendant gave no *notice* of his final settlement. In that settlement he claimed and was allowed by the probate court, commissions on assets of the estate of the plaintiff's father not administered by him, to the amount of $2,923.56. It is alleged that the allowance of these commissions was *illegal,* and that *pro tanto* she was "deprived" of her property "without due process of law." It is true the Supreme Court of Missouri in delivering its opinion in the case, made no reference to the XIVth amendment to the Constitution of the United States. But it did pass upon the constitutionality of said statute in these words, viz: "The *statute* which provides for *notice* on final settlements, therefore, has no application to settlements made by an administrator *pendente lite, and no notice is required.*" (Record, page 20.)

"In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State Court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal Question was presented, but the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State Court when the determination or judgment of that court could not have been given without deciding upon a right or

authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has bean attached to the inquiry whether the Federal Question was formally raised. In *Crowell vs. Randell*, (10 Pet. 368), it was laid down, after a review of almost all our previous decisions, "that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms, in *ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment." This case was followed by *Armstrong et al. vs. The Treasurer of Athens County*, (16 id. 281), where it was held sufficient to give this court jurisdiction if it appear from the record of the State Court that the Federal Question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it. See also *Bridge Proprietors vs. The Hoboken Company*, 1 Wall. 116, *Furman vs. Nichol*, 8 id. 44." Per Mr. Justice Strong in Murray vs. Charleston, 96 U. S. on pp. 441-2.

It is admitted, that if she had been notified; had had her day in court; and had had an *opportunity* to disprove the defendant's *illegal* commissions, even on very short notice, and she did not avail herself of such opportunity, that she would be estopped from afterwards controverting the *legality* of said commissions, as the following cases show:

Hagar vs. Reclamation Dis., 111 U. S., 701.
Chicago Life Ins. Co. vs. Needles, 113 U. S., 745.
Kennard vs. Louisiana ex rel., Morgan, 92 id. 480.
Foster vs. Kansas, 112 id. 201

The Federal Question relied on by plaintiff, was expressly presented in the plaintiff's bill to the Supreme Court of Missouri. The decision of it was necessarily involved in

the case. The Supreme Court of Missouri was compelled to pass on it. It did pass on it; and in doing so, if it made no reference to the Federal Question the plaintiff shall not lose her rights for that reason. She could not compel the Court to refer to the question *ipsissimus verbis*. When a party has a right secured by Federal law, ~~their~~ his right cannot be denied by silence or evasion.

Chapman vs. Crane, 8 Sup. Court Rep., 215.

The Federal question lies in *front* of this case, and it must be decided before the *equity* in this case can be reached.

Chapman vs. Crane, 8 Sup. Court Rep., 215.

The plaintiff never had any *notice* nor any *opportunity for defense*. Hence the judgment of the probate court approving the defendant's so-called final settlement is not binding on the plaintiff. She never had her day in court. She has been "deprived" of her property "without due process of law." It is one of the highest duties of this Court to see that the constitutional right of the plaintiff to "due process of law" in protecting her property, is preserved, and that this right shall not be evaded or frittered away by the construction given to the statute in question by the Supreme Court of Missouri.

Hall vs. Finch, 104 U. S., 261.
Railroad vs. National Bank, 102 id. 14.

The defendant not having given any notice of his final settlement, it stands in the category with *annual* settlements of administrators, guardians and curators. It is a mere *exhibit,* and as such allowances and credits taken therein are subject to correction, if illegal or erroneous.

Picot vs. Biddle's Admin., 35 Mo. 29.
Sheetz vs. Kritley, 62 *id.* 417.

State, etc. vs. Roeper, 82 *id.* 57.
North vs. Priest, 81 *id.* 561.
Baker vs. Runkle, 41 *id.* 391.

It follows, then, that if the defendant's so-called final settlement was only an *exhibit* and did not have the force and effect of a final settlement made after a legal *notice* had been given it is not *res adjudicata.*

A bill in equity to surcharge and falsify the defendant's *ex parte* final settlement is the proper remedy in a case of this kind. The allowance of the *illegal* commissions charged in the plaintiff's bill is a constructive fraud.

Oldham vs. Trimble, 15 Mo. 225.
Clarke vs. Henry's Admin., 9 *id.* 339.
Clyce vs. Anderson Ex'r, 49 *id.* 37.
Smiley vs. Smiley, 80 *id.* 44.

An administrator is a *trustee*, and as such he is bound to administer the trust confided to him with the utmost good faith, and not make money at the expense of his *cestui que trust.*

Houts vs. Shepherd, 79 Mo. 161.
Merritt vs. Merritt, 62 *id.* 150.

All the *cestuis que trust* were either *married* women or *minors* at the time of defendant's making his so-called final settlement, except Mary N. Helm, daughter of the testator. Can it be said that the judgment of the probate court approving settlement is binding on these *cestuis que trust*, all of whom were laboring under the disability of either coverture or *infancy*, except said Mary N. Helm? Did they have an opportunity to show the illegality and injustice of allowing defendant's $2,923.56 commissions on assets not administered by him? Are persons who have not legal capacity to protect their own interests to be stripped of the bounty of

their father and grand father by this *ex parte* judicial proceeding; and when this plaintiff in her own right, and as the assignee of their respective rights, seeks redress by a bill in equity to call the defendant to an account, the court of first instance sustains a demurrer to her bill on the ground that there is no equity in her bill; and the whole subject matter has been adjudicated and finally determined in courts of competent jurisdiction and final resort, shall she be denied it now? Can these *cestuis que trust* be deprived of their property by such an *ex parte* judgment as this Is this "due process of law" within the ~~province~~ purview of the XIVth amendment? If it is, then the XIVth amendment is no more efficacious in protecting the property of an individual against the errors of the State judiciary than the Pope's bull was against keeping off the comet.

This Court has, so far, not decided what constitutes "due process of law" in every case.

In the language of ~~Chief~~ Mr. Justice Miller, in Davidson vs. New Orleans, (96 U. S. 194,) it has left the decision to "the general process of judicial inclusion and exclusion, as the cases presented for decision shall require." It is respectfully submitted, however, that the plaintiff in this case has been "deprived" of her "property without due process of law," and that she is entitled to the protection guaranteed by the XIVth amendment to the Constitution of the United States.

But the *equity* of this case can never be uncovered and developed so long as the *Federal* Question presented by this record shall remain undecided.

The *Federal* Question stands in *front* of the *equity* question and completely bars the entrance to it. This case comes fully and clearly within the principles enunciated by this Court in Murdock vs. Memphis, 20 Wall., 590, and Railroad Co. vs. Maryland, 20 id., 643.

The defendant was only entitled to five per cent. commsision on the money actually paid out by him in the course of his administration, *i, e.*, five per cent. on $24,103.39.

Hawkins vs. Cunningham, 67 Mo., 415.

The following cases show what constitutes due process of law, and what does not.

Hagar vs. Reclamation Dis., 111 U. S., 701.
Davidson vs. New Orleans, 96 U. S., 97.
Foster vs. Kansas, 112 U. S., 201.
Kennard vs. Louisiana, 92 id., 480.
Slaughter House Cases, 16 Wall, 36.
Pennoyer vs. Neff, 95 U. S., 714.
Baswell's Lessee vs. Otis, 9 How., 336.
Webster vs. Reid, 11 id. 437
Nations vs. Johnson, 24 id., 195.
Munoy's Lessee vs. Hoboken L. I. Co., 18 id., 272.

FINIS.

Now, whether it shall be held that there is no statute requiring an administrator *pendente lite* to give *notice* of his final settlement; or that the statute did require the defendant to give notice of his final settlement and he failed to give it, either way the judgment of the probate court is not binding on the plaintiff for want of *notice*, and the judgment of the Supreme Court of Missouri is erroneous, and it should be reversed and the case remanded, with instructions to grant plaintiff a hearing on the merits.

JAMES CARR,
Of Counsel for Plaintiff in Error.

4-58

Office Supreme Court U. S.
FILED
MAR 20 1888
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CLERK

Supreme Court of the United States,

No. 1088.

OCTOBER TERM 1887.

SARAH C. ROBARDS,
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VS.
ALFRED W. LAMB.

In Error to the Supreme Court of Missouri.

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No. 1088.

OCTOBER TERM 1887.

SARAH C. ROBARDS,

PLAINTIFF IN ERROR.

VS.

ALFRED W. LAMB.

In Error to the Supreme Court of Missouri.

Supplemental Brief in opposition to Motion to dismiss for want of Jurisdiction.

The Supreme Court of Missouri did not affirm the judgment of the Hannibal Court of Common Pleas on the first ground of demurrer i. e. that John L. Robards, the plaintiff's husband, was a necessary party. In the opinion delivered it passes it by sub silentio The legacy to the plaintiff was her separate property.

Laws of Missouri 1875, page 61.

When a married woman is party her husband need not be joined with her "when the action concerns her separate property."

General statutes of Missouri, p. 654. Sec. 8. Chap. ~~65~~ 61.

The Common Pleas Court overruled a motion to make him a party. (Record p. 16.) Leave would have been granted if he had been a necessary party.

The second and shird grounds of demurrer are the same, i e that there is no equity in the bill. There is equity in the bill, but the Supreme Court of Missouri has never heard this case on its MERITS. It cut the executors off from a hearing on the merits by a technicality. It treated the receipt given by the executors as a satisfaction of the judgment of the Probate Court, and the executors having acknowledged satisfaction of the amount found by the Probate Court in the defendant's hands as administrator pendente lite, they were estopped from contesting the legality of the commissions on assets not administered by the defendant.

And when the plaintiff sues in her own name to recover the illegal commissions allowed by the probate court on an ex parte proceeding without any notice to her, she is gravely told by the Supreme Court, "There is no need of any notice, for there is then a regular representative of the estate with whom the settlement is made, under the direction of the Probate Court." thus cutting her off and a second time denying a hearing on the MERITS. There is merit in this case and equity in this bill. Under the statutes of the State of Missouri an administrator is entitled to a commission of five per cent. as full compensation for his services and trouble on personal estate.

Sec. 9, Chap. 124, Gen. Stat. Mo., p. 506

This statute has been construed by the Supreme Court of Missouri in regard to the compensation of an administrator pendente lite as follows:

Says Judge Henry in construing the section in question in reference to the commission of an administrator pendente lite:

Hawkins vs. Cunningham, 67 Mo., on p. 418.

"The 9th section, Chapter 124, Gen. Statutes of Mo., p. 506 (p. 108 Wag. Stat.), allowing to executors and administrators five per cent. on personal estate as compensation for their services, construed with reference to Section 13, does not embrace administrators appointed pending a suit to contest the validity of a will. Any other construction would lead to consequences which could not be tolerated. If it is to receive the broad construction contended for by the appellant, an administrator might qualify, make his inventory and appraisement, then, performing no other service, resign and charge full commission; one appointed in his stead might qualify, receive the assets from his predecessor, and having performed no

other duty, resign and receive full commission, and this might be repeated by successive administrators until nothing of an estate would be left. The commission allowed is a compensation for the services performed by the administrator. If he fully administers the estate he is entitled to the full commission. If he chooses to resign, or if for cause he be removed, before he fully administers the estate, he will only be allowed reasonable charges for leasing real estate, legal advice and service, collecting and preserving the estate, and five per cent, upon the amount of money he may have actually paid out. Delivering to his successor the money, notes and accounts remaining in his hands at the date of his resignation or removal is not to be considered a payment of money on which he is entitled to charge commission. If money has been collected by him and not paid out when he resigns or is removed, he will be compensated for that service under Section 9, for 'collecting and preserving the estate.'"

This construction shows conclusively the defendant was only entitled to a commission of five per cent on the amount of money he actually paid out. All over and above that was illegal, and the defendant had no right to it, and he should be made to disgorge it. Thus it will be seen that the equity of this case can never be reached under the construction given by the Supreme Court of Missouri to the statute in question. The plaintiff is entirely remediles in the state courts. S he will be "deprived" of her "property without due process of law" unless this court construe said statute as being repugnant to the first section of the XIV amendment to the Constitution of the United States.

The defendant's final settlement was no more than his ex parte statement of his accounts, because he had given no notice of it, and it stood on the same footing as an annual settlement. Annual settlements are always open to corrections for over-charges, fraudulent charges, errors and omissions of every kind, when the final settlement is made. The reason is that no notice of annual settlements is ever given, The administrator is required to give notice of his final settlement, and then the parties interested have a right to appear in the probate court and have all errors in the final and annual settlements corrected, and if they do not appear when they have notice to do so the settlement as approved by the probate court becomes RES JUDICATA. It is the notice and the opportunity given to

correct all errors that makes the final settlement conclusive and binding on the parties interested. The decisions af the Supreme Court of Missouri on this subject are fully reviewed in the case of

State vs. Raeper, 82 Mo, 58,
Picot vs. Biddle, 35 id 29.

Under the system of code pleading which obtains in Missouri there is but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs; that is by petition, which shall contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repitition."

Sec. 3, Chap. 165, p. 658, Gen. Statutes Mo.
Sec. 1. Chap. 161, p. 651, ibid.
Tyler vs. Maguire, 17 Wall, on p. 285-8.
Kerr vs. Simmons, 82 Mo. 269.
Pier vs. Heinrichoffer 52 id 333.
State vs Carroll 63 id 156.

The petition in this case complies fully with the requirements of the code of Missouri in setting out "a plain and concise statement of the facts constituting a cause of action." The illegal commissions charged on the assets of the estate in question was a fraud in law and if the plaintiff has any right to recover them, then the facts showing the cause of action are sufficiently alleged. The supreme court of Missouri says in the opinion delivered in this case: "The petition does not seek relief on the ground of fraud." With all due defference to that court we join issue on this opinion and say that the facts alleged do show fraud in law. It was not necessary to allege fraud in totidem verbis. That is a legal conclusion from the facts alleged.

Sec 211
Bliss Code Pleading 2 ed.
Hess vs, Young 59 Ind. p. 379.
Smith vs. Sims 77 Mo. p. 296
Sharkey vs. McDermott 01 id. 647.
Smiley us. Smiley 80 id. 44.

The decision of the Supreme Court of Missouri is put on the ground that there is no need of notice; for there is then a regular representative of the estate with whom the settlement is made under the direction of the Probate Court. The statute which provides for

notice on final settlements therefore has no application to settlements made by an administrator pendente lite, and nottce is not required."

The conclusions from the decision in this case are the following, viz.:

First. That the executors represented the estate when the administrator pendente lite made his final settlement.

Second. That the statute did not require the defendant to give notice of his final settlement.

Third. That the receipt given by the executors to the defendant for the notes, etc., on hand at the date of his making said settlement and the delivery thereof to the executors operated as a satisfaction of the judgment of the Probate Court and was a complete bar to plaintiff's suit to recover the illegal commissions allowed defendant in said settlement by the Probate Court.

Now it is averred that there was no privity between the plaintiff and the executors; that the Legislature of the State has not performed its duty under the XIVth Amendment to the Constitution of the United States in not enacting a law requiring an administrator pendente lite to give notice of his final settlement; that the receipt given by the executors to the defendant for the notes, etc., on hand at the date of his making his final settlement and the delivery thereof to the executors did not operate as a bar to plaintiff's suit to recover the illegal commissions allowed to defendant in said settlement by the Probate Court; that the judgment of the Probate Court approving said settlement is not res judicata as to the plaintiff.

The plaintiff claims and derives her title under the will of her father and not under the executors. There is no privity between the plaintiff and the executors. The receipt given by the executors to the defendant for the assets turned over to them could and did only bind them. No statements or admissions in that receipt could or did bind the plaintiff.

De Mora vs. Concha, 29 Ch. Div. 268.

Brigham vs. Fayerweather, 140 Mass., 415.

It follows, then, that the plaintiff's petition does state facts sufficient to constitute a cause of action; that there is equity in her bill; that the judgment of the Probate Court on the ex parte proceeding of the defendant is not res judicata as to the plaintiff, because she had no notice thereof; that she has been illegally and unjustly "deprived" of her "property without due process of law;" that she is not

estopped from maintaining this suit against the defendant to recover the illegal commissions charged and allowed in his final settlement on assets not administered by him. But the equity of her case lies entirely behind the Federal question in the case, i. e., that there can not be "due process of law" within the purview of the first section of he XIVth Amendment to the Constitution of the United States without notice, actual or constructive, to plaintiff.

Respectfully submitted.

JAMES CARR,
Of Counsel for Plaintiff in Error.

24-58

Supreme Court of the United States.

OCTOBER TERM, 1887.

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SARAH C. ROBARDS, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF MISSOURI.

G. G. VEST,
For Defendant in Error.

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IN ERROR TO THE SUPREME COURT OF MISSOURI.

MOTION TO DISMISS OR AFFIRM.

The Court is moved to dismiss the writ of error or to affirm the judgment herein on the following grounds:

1. This Court is without jurisdiction under section 709 of the Revised Statutes.

2. If any question cognizable under that section was in fact decided, such decision was not necessary, and the judgment rendered is supported on grounds which this Court has no jurisdiction to review.

G. G. VEST,
For Def't in Error.

The above motion will be submitted three weeks from service of copy of same and accompanying brief.

Statement, Brief, and Argument of Defendant in Error in Matter of Motion to Dismiss for want of Jurisdiction.

STATEMENT.

The record in this case consists almost wholly of the original petition of the plaintiff in error and the decision of the supreme court of Missouri, to which an appeal was taken from a judgment of the trial court rendered on a demurrer to the petition of plaintiff.

The facts as shown by the record are substantially as follows:

In 1872, John B. Helm, a resident of Marion county, Missouri, died at Hannibal, in said county, leaving a will with eight codicils, in one of which codicils John L. RoBards, the husband of plaintiff in error, and Joseph J. Johnson were appointed executors. The will, with its codicils, being propounded to the probate court of the county, having jurisdiction, the original will was probated in common form but the codicils were rejected. Thereupon, on June 21, 1872, Mary A. Helm, widow of the testator, being next entitled to administer under the law of the State, was appointed by the probate court administratrix with will annexed of the estate of said John B. Helm.

Thereafter, on July 23, 1872, legatees interested in the rejected codicils instituted a suit to contest the will, as probated, and with the purpose of having the will with its codicils probated in solemn form, which under the statute

law of Missouri can be done at any time within five years after the probate in common form (R. S. Mo., 1879, sec. 3980.) On August 13, 1872, pending the contest over the will, the probate court revoked the letters of administration of said Mary A. Helm and appointed the defendant in error as administrator, *pendente lite*, under section 13, chapter 120, Gen. Stat. of Mo., now being section 14, R. S. Mo., 1879, and in words as follows: "If the validity of a will be contested or the executor be a minor, letters of administration shall be granted during the time of such contest to some person, who shall take charge of the property and administer the same under the direction of the Court, and account for and pay and deliver all the moneys and property of the estate to the executor or regular administrator, when qualified to act"—quoted in decision of the Court, Rec., p. 19. This appointment was contested and finally decided in the supreme court of Missouri in Lamb, administrator, *vs.* Helm, administratrix, 56 Mo., 433.

On the 6th May, 1874, the contest over the will terminated in the will with its codicils being admitted to probate in solemn form (Rec., p. 5). Thereafter, on the — May, 1874, said John L. RoBards and Joseph J. Johnson were duly qualified as executors of the will of said John B. Helm. Thereupon, on May 19, 1874, the defendant in error filed with the probate court his final settlement as administrator *pendente lite*, and on the same day the probate court made its order that the defendant in error turn over and deliver to said executors of said will all the balance due the estate in his hands, amounting to the sum of $56,136.39, and take their receipt therefor, and upon filing the same in court that he, as administrator *pendente lite*, should be discharged (Rec.,

p. 6). The assets were turned over, receipt taken, and filed in the probate court; all done on said 19th day of May, 1874, and thereupon the probate court made the following order on the same day, as follows:

"Now, at this day, Alfred W. Lamb, administrator *pendente lite* of the estate of John B. Helm, deceased, produces into court the receipt of the executors of said estate of said John B. Helm for all properties held by him as administrator *pendente lite*, it is therefore ordered that said administrator be discharged." (Rec., p. 7.)

This settlement of defendant as administrator and judgment of his discharge was made without any notice by publication of his intention to make his settlement. Plaintiff in her petition (Rec., p. 8). says: "Said administrator *pendente lite* did not advertise his intention to make a final settlement of his said administration, as required by section 43 and section 47 of chapter 120, and section 20 of chapter 121 and section 16 of chapter 124 of the General Statutes of Missouri. In this final settlement of the administrator *pendente lite* a commission was allowed him of $4,128.76.

The contention in this case is that this amount of commission was excessive; that the amount which ought to have been allowed was $1,205.20, making the excess $2,923.56, and to recover which, with interest, this suit is brought. (Rec., pp. 10, 11.)

Said Joseph J. Johnson having resigned his executorship, the other executor, said John L. RoBards, husband of plaintiff herein, took an appeal from the said judgment of discharge of the probate court of this defendant as administrator *pendente lite*, with the view of contesting the said

amount of commission allowed. This was proscuted to final judgment in the supreme court of Missouri, and resulted unfavorably to said executor. (RoBards, Ex'r, *vs.* Lamb, 76 Mo., 192.) In this opinion it was held that the judgment of discharge of the said administrator *pendente lite*, based upon a full receipt given by the executors, was final and conclusive, and they could not open the judgment. After this decision, in November, 1883, the said RoBards, as executor, after giving due notice, made a final settlement of the estate of said John B. Helm and was discharged. It is claimed that by reason of the want of notice of the intention of the defendant to make his said final settlement that a cause of action thereby arose against him in favor of the legatees under the said will for the said amount of excess of commission allowed, it being further averred that the said judgment of discharge was made without due process of law and in violation of section one of the Fourteenth Amendment of the Constitution of the United States. Plaintiff was one of the legatees under the will, and she became owner of the alleged cause of action by assignment from the remaining legatees, and thereupon instituted this suit in her own name. There is no allegation or intimation of any fraud in this settlement or in the final judgment of the probate court.

A demurrer was interposed to the petition of the plaintiff on the following grounds:

1st. Want of capacity in plaintiff to sue alone, she being a married woman.

2d. Sufficient facts were not stated in the petition to constitute a cause of action.

3d. No equity in the bill.

4th. *Res adjudicata*, it appearing from the petition that the same cause of action had been finally adjudicated. (Rec., p. 12.)

This demurrer was sustained. A motion was then filed by the plaintiff to make her husband, said John L. RoBards, a coplaintiff. This motion was overruled. (Rec., p. 13.) Thereupon plaintiff stood upon the demurrer, and final judgment against her having been made, she appealed to the supreme court of Missouri, which rendered its decision affirming the judgment of the court below. This decision and judgment is the one reported at length in the record, and to which the writ of error herein was directed. (Rec., p. 18.) A motion for a rehearing was filed in the supreme court of Missouri, based on alleged inadvertance of plaintiff to call attention of the court to two decisions of said court. This motion was overruled. (Rec., pp. 20, 21.) Thereafter the writ of error herein was issued, and the case brought to this Court, erroneously as contended by the defendant in error herein.

BRIEF AND ARGUMENT.

It is apparent from the record that no Federal question was presented to and decided by the supreme court of Missouri. No such question was necessary to the decision and judgment made, and none such was passed upon by the Missouri supreme court; hence the Supreme Court of the United States has no jurisdiction to review the judgment of the supreme court of Missouri given in the case. (Detroit City Railway Company *vs.* Jacob Guthard, 118 U. S., 133; Chouteau *vs.* Gibson, 111 U. S., 200; Murdock *vs.* Memphis,

20 Wal., 590; Brown *vs.* Colorado, 106 U. S., 97; McManus *vs.* O'Sullivan, 91 U. S., 578; Brown *vs.* Atwell, 92 U. S., 329; Zimmerman *vs.* Nebraska, 116 U. S., 54.)

The contention on the part of the plaintiff was that under certain sections of the statute laws of Missouri regulating procedure in probate courts in said State, being the sections specifically mentioned in her petition, as before stated, the defendant, as administrator *pendente lite*, should have given notice by publication of his intention to make his final settlement, as specified in said sections of the law, and by reason of a failure so to do the judgment of discharge was not final as against the legatees, and by them could be set aside, this being the purpose of the suit instituted by the plaintiff.

The supreme court of Missouri passed directly upon this question, as will appear from its opinion, part of the record herein, and made part of the record of the case by article VI, section 15, of the constitution of the State of Missouri, which provides that "the opinions of said court shall be in writing, and shall be filed in the cases in which they shall be respectively made, and become part of their record." The court decided that the statute law invoked by the plaintiff had no reference to settlements made by administrators *pendente lite*, and only referred to final settlements of administrators and executors when finally settling up the whole estate and settling with creditors and beneficiaries of the estate, and in which cases notice by publication must be given as prescribed by the statute. The court further decided, as will appear from its opinion, that an administrator *pendente lite* under the law and decisions of Missouri occupied a position similar to that of a receiver acting under the direction of the court, only appointed for temporary purposes. That under

the law of the State under which his appointment is made, he has under the order of the court only to settle with the regular administrator or executor of the estate, after the contest over the will is ended, when his power to act terminates, and having to deal with them directly, no notice is necessary or required. In other words, the court decides that the settlement and judgment of discharge of the defendant in error, as administrator, was made in accordance with the statute law of the State.

The allegation of the plaintiff in her petition that the said judgment was made without due process of law, and was in violation of a provision of the Constitution of the United States was simply an argumentative deduction made after her direct allegations that by the statute law of the State the administrator *pendente lite* was required to give notice by publication of his intention to make final settlement, and was neither directly nor indirectly alleged or urged against or with reference to the said statute under which the said settlement and judgment of discharge was made. No question was either raised or presented to the supreme court of Missouri, or passed upon by that court as to the constitutionality of the statute under which the settlement of the defendant was made, and upon which the opinion of the court was based.

In the motion made by the plaintiff for a rehearing in the supreme court of Missouri no claim is made nor intimation given that the court had omitted or failed to consider or pass upon any Federal question raised by her in the case. This makes it perfectly clear, as is apparent from the record, that no Federal question was presented to the court or passed upon by it. The opinion of the Court in the re-

cord herein shows that its judgment was based upon statute law of the State, against which no constitutional objection was raised by the plaintiff, and therefore the judgment was not against any constitutional right presented to the Court, for none was presented and none passed upon, and without which the Supreme Court of the United States has no jurisdiction to review the said judgment of the supreme court of Missouri. (Chouteau *vs.* Gibson, 111 U. S., 200; Adams County *vs.* Burlington and Missouri River Railroad, 112 U. S., 126, 127; Chapman *vs.* Goodnow, 123 U. S., 540; State of Missouri *vs.* C. Arthur Preller, decided at this term and not reported.)

The decision of the Missouri court is based upon a construction simply of the State statute, and no Federal question is involved. It is not contended that the State law so construed is in violation of the Constitution of the United States. The case comes clearly within the rule announced by this Court in the following cases: New York Life Insurance Company *vs.* Hendren, 92 U. S., 286; Dogger *vs.* Bocock, 104 U. S., 595; San Francisco *vs.* Scott, 111 U. S., 769; Graeme *vs.* Insurance Company, 112 U. S., 274; Citizens' Bank *vs.* Board of Liquidation, 98 U. S., 140.

But if the Court should determine that a Federal question is involved, under the rule in Murdock *vs.* Memphis, 20 Wall., 590, the judgment herein should be affirmed.

The ruling of the Missouri courts as to the statute of that State is unquestionably correct, and supports the judgment fully.

G. G. VEST,
For Defendant in Error.